UNITED STATES - IMPORT MEASURES ON CERTAIN PRODUCTS FROM THE EUROPEAN COMMUNITIES

Appellee Submission of the United States

Executive Summary

1. This appeal involves the fifth attempt by the EC to have a WTO adjudicatory body legislate changes to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and its third to have declared null and void the work of the DSU Article 22.6 Arbitrator in *EC – Bananas*, the first such body to decline the EC's invitation to legislate. Towards this end, the EC in this appeal seeks to reverse certain of the Panel's factual findings and aspects of its reasoning. Specifically, the EC seeks to have the Appellate Body: (1) reverse the Panel's factual finding that the steps announced by the United States on March 3, 1999 and instituted on March 4, 1999 ("the 3 March Measure") involved changes to bonding requirements, and that these changes were legally distinct from actions which the United States took on April 19, 1999, following the Dispute Settlement Body's ("DSB") authorization to suspend concessions; (2) declare that DSB decisions taken by negative consensus, such as the April 19 DSB authorization, may be declared invalid or treated as without effect; and (3) reverse Panel *dicta* that an Article 22.6 arbitrator may consider whether an implementing measure complies with a Member's WTO obligations as part of its work.

2. The first issue concerns findings of fact by the Panel, not issues of law or legal interpretations, and therefore this issue is beyond the scope of appellate review. Furthermore, the second and third issues did not need to be addressed to resolve this dispute, and therefore are essentially *obiter dicta*. Nevertheless, to the extent the Panel actually did address them, the Panel was correct, and should the Appellate Body reach these issues, the Appellate Body should uphold the Panel.

3. Despite mere assertions to the contrary, the 3 March Measure only changed bonding requirements, and not duties. This was a factual finding beyond the scope of appellate review. The Panel questioned the United States in detail on its laws and regulations regarding bonding requirements and the events of March 3 and April 19, and drew the correct factual conclusion that the changed bonding requirements of March 3 were legally distinct from the increased duties of April 19, and that the March 3 bonding requirements are no longer in existence. The Panel also correctly concluded that it was not within its mandate to assess the WTO-compatibility of the April 19 actions. These events did not even exist when the EC requested consultations, and they were not the subject of consultations. Moreover, they are not described as the measure in the EC's panel request.

4. With regard to the EC's second claim, there is no legal basis for concluding that a DSB decision taken by negative consensus, such as the April 19 DSB authorization to suspend

concessions, may be treated as invalid or lacking effect, and the EC makes no showing to the contrary. Moreover, the Panel did not even rely on the April 19 DSB authorization to reach its factual conclusion that the 3 March Measure is "no longer in existence," as the EC speculates. The panel in fact denied that it was drawing the conclusion that the April 19 authorization "cured" inconsistencies found for the 3 March Measure.

5. Finally, while the Panel did not need to reach the relationship between DSU Articles 21.5 and 22 in order to make findings on whether the changed bonding requirements of March 3, 1999 were inconsistent with DSU Article 21.5, the Panel's statements concerning this relationship were correct. The Panel did not need to reach the issue because the measure at issue, changed bonding requirements, does not implicate this question, and the EC's terms of reference did not include the U.S. DSU Article 22.2 request as part of the measure. The Panel also did not need to reach this issue because under its interpretation of how the 3 March Measure breached DSU Article 21.5, the only relevant fact was that multilateral proceedings, of any sort, had not yet been completed.

6. The Panel was, however, correct in its substantive interpretation. The EC's reading of DSU Article 21.5 is not supported by the text of either that provision or Article 22, and would nullify the right to suspend concessions with the benefit of the negative consensus rule provided for in DSU Articles 22.6 and 22.7. The text of Article 21.5 does not limit the phrase "these dispute settlement procedures" so as to preclude consideration of implementation compliance by an Article 22.6 arbitrator, and the arbitrator's mandate to evaluate the equivalence between the level of suspension proposed and the level of nullification and impairment requires it to evaluate both sides of this equation. The EC's theory would, moreover, create a conflict between the time frames in Articles 21.5 and 22, and nullify the right of Members to receive authorization to suspend concessions with the benefit of the negative-consensus rule provided for in Articles 22.6 and 22.7. The EC's objections to time frames and other aspects of Article 22.6 arbitration cannot override the text of the DSU as written and agreed in Marrakesh, and are properly directed to Members in the context of a request for an amendment. Finally, the practice of Members supports the Panel's conclusion, inasmuch as it indicates that Members understand that a request for suspension must be made within 30 days of the conclusion of the reasonable period of time if they are to receive the benefit of the negative consensus rule.